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NO. 3808 1555

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE

Brief of Plaintiff in Error

JAMES WICKERSHAM
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STATEMENT OF THE CASE

An indictment was returned against the plaintiff in error at Juneau, Alaska, on October 11, 1921, charging that on July 1, 1921, he " did, the said Peter Sekinoff being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the

age of sixteen years, to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malachoff."

The indictment states in its heading that it is based on "Section 1894, C. L. A.," or Compiled Laws of Alaska, 1913, which section reads as follows:

> "Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape."

Defendant was tried on October 19-20, and the jury returned a verdict of Guilty of Assault with Intent to Commit Rape. A motion for new trial was denied and he was sentenced to serve six years in the penitentiary.

The evidence in the transcript shows the defendant is a Russian from the Black Sea region, but a few years in the United States, and unable to speak or read and write the English language. The prosecuting witnesses, the Malachoffs, are also of Russian blood, but born and raised at Sitka, Alaska. They speak the English language, and are otherwise well acquainted with the customs and laws of the region in which they live, and therein had a very great advantage over the defendant. The latter is a miner and has engaged in that work in various parts of the Territory of Alaska; he had also accumulated a small sum of money. The evidence shows the Malachoffs were in need of money and got it from Sekinoff through pretending friendship for

him as one of their own nationality; at their request he loaned them some $850.00, for which they gave him their note and a mortgage on a worthless piece of real estate. No part of the loan has been repaid.

The Malachoffs have six children; defendant was a frequent visitor at their house and the children all seemed fond of him. Things went along in a friendly way, the Malachoffs seeking to get him to invest in a mine they claimed to own at Sitka, and in other enterprises, until their note became due, and Sekinoff sought to recover interest, rent, or some return on the loans. On the very day that Sekinoff's attorney visited the Malachoff house to get an understanding about the return of his loan, or some payment thereon, the Malachoffs went to the officials to make complaint against him for this offense.

Mrs. Malachoff is the moving influence in the case; her character is mildly sketched by Mrs. Kashaveroff, who has known her for many years, P. 77, Tr., and by her own offensive language in relating her story of an alleged attempt by Sekinoff to rape her person, at some time prior to the date when she wheedled him out of $850.00,—the loan made to her and her husband by Sekinoff. Notwithstanding this alleged assault upon her honor, Mrs. Malachoff testified she dissembled and hid the facts from her own husband while they were getting the loan, and after that date until the time for payment, and even then until something was needed to support the same kind of a story told by her daughter. Then and not until did she relate her own evil and utterly immaterial story to the court and jury.

SPECIFICATION OF ERRORS

Counsel for Plaintiff in Error intends to urge and assert the following as the most potent of those errors committed on the trial below:

I

Insufficiency of the evidence to justify the verdict and that the verdict is against the law.

II.

Error in law occurring at the trial and excepted to by the defendant.

III.

Error in the court in giving instruction number XI, excepted to.

IV.

Error in giving instruction number XIII, excepted to.

V.

Error in refusing to give instruction set out as number III. in the Assignment of Error herein.

VI.

Error in instructions XI. and XIII., in failing and refusing to give full and sufficient instructions on the law of attempts to commit the crime charged, or included crimes, or in the lessor degrees thereof.

VII.

Error in the court in instructing the jury that it might find the defendant guilty of assault with intent to commit rape under the indictment in this case.

VIII.

Error of the court in not giving, of its own motion, those statutory charges required by the laws

of Alaska, stated in paragraphs 7, 8, and 9 in the Assignment of Errors in this case.

IX.

Error in overruling the motion for a new trial.

X.

Error in receiving the verdict of the jury herein finding the defendant guilty of assault with intent to commit rape, and in pronouncing sentence against the defendant upon such verdict.

POINTS AND AUTHORITIES

1. *Insufficiency of the evidence to justify the verdict and that the verdict is against the law.*

Upon the making of the motion for a new trial the foregoing statutory objection was urged in support thereof and overruled, and assigned as error. P. 159, Tr.

The record shows that only a single witness, Sonia Malachoff, the prosecuting witness, testified to any material fact against the defendant, connecting him in any way with the crime charged. The record also shows the jury utterly refused to accept her story as true, and refused to return a verdict based on her evidence; but misled by the hearsay statements of other impressive witnesses and the misleading instructions of the court, found defendant guilty of an independent crime, not included in that charged in the indictment.

The defendant was charged with the crime of statutory rape upon the person of Sonia Malachoff, at Juneau, Alaska, on the 1st day of July, 1921, as

stated in the indictment, P. 1, Tr.

No direct evidence in relation to the crime charged was offered by any witness, except by Sonia Malachoff, the prosecuting witness, and Sekinoff, the defendant. She swore to the facts positively, showing the actual commission of the crime of Statutory rape upon her person, with her consent, five or six times, at as many different times, beginning in the month of May, 1921, while the defendant as positively denied the facts alleged by her.

(a) HEARSAY TESTIMONY BASIS OF CONVICTION

Mrs. A. P. Kashaveroff, a member of the board of Childrens Guardians, and Mrs. S. M. Malachoff, the mother of the prosecuting witness, were called by the Government and allowed to repeat at great length and with much force, certain conversations they had with Sonia Malachoff, at a date long after the commission of the crimes charged, and were permitted without objection to relate the inquiries they made and the answers thereto, to the jury. Their whole testimony, (Pages 73 and 81, Tr.) is the rankest hearsay and in violation of the rule stated by this court in another Alaskan case of this kind.

Callahan v. United States, 240 Fed. 683.

In the Callahan case the court said:

> "In the case at bar there is entire absence of circumstances to justify the admission of testimony such as that given by Laura Harrington. The statement of which she testified was made to her, not as a complaint, not as an expression of outraged feeling, not under excitement produced by an external shock, but pure-

ly as a matter of interesting information in a casual conversation between two intimate friends. It cannot be said that its admission was harmless error, for the plaintiff in error and Grace Carey were the only witnesses who testified concerning what transpired between them. Their testimony was sharply contradictory, and the evidence of Laura Harrington was admitted for the purpose of corroborating the testimony of Grace Carey."

Calahan v. United States, 240 Fed. 683 (685).

In an Oregon case (State v. Sargent, 32 Ore. 110; 49 Pac. 889). the court said:

"In the case at bar, Mrs. Robbins, by a sweeping sentence, in effect testified to all that the two girls had told her concerning the alleged assault upon Bessie by the defendant, and under the rule it was error to permit it. This could not be deemed less than a repetition of the children's narrative of the occurrence, and therefore subject to the very pertinent objection that it was hearsay. It was proper for the mother to testify to the fact that Bessie had made the disclosure, and to describe her manner and appearance at the time, and the condition in which she found her person upon examination made, but not to relate what the girls had told her touching the particulars of what transpired relative to the alleged assault. For this error the case must be reversed."

State v. Sargent, 32 Ore. 110; 49 Pac. 889.

An attempt was made by the prosecution to get from Mrs. Malachoff, the mother of the prosecuting witness, one pretended fact of corroboration concerning the presence of seminal matter on the undergarments of her daughter. (P. 84, Tr.) She said that weeks after these soiled clothes had been placed in the mass of dirty garments she did the family washing and then saw this seminal stain upon them. But these and other dirty clothes had lain in this mass for weeks, and not even this willing witness could positively recognize the matter mentioned as such male fluid, or swear that it might not have originated from other sources, or what it was or where it came from. No special examination was made to ascertain its character; it was not connected in any way with the defendant, or with his alleged activities with her daughter, and no court should commit an accused person to the penitentiary on such farfetched and flimsy evidence.

There is not a scintilla of evidence from any other source in support of the girl's charge against the defendant. No other witness states a single fact in support of the material evidence testified to by her. No other witness in this case states a single fact in support of the charges of the Malachoff woman. Neither the girl nor the mother support each other in a single material fact, on the main charge necessary to the conviction of the defendant.

There is no corroborating testimony anywhere in the record in support of Mrs. Malachoff's belated charge that defendant had once attempted to commit a rape on her person (P. 89, Tr.) She did not relate that doubtful, suspicious and prejudicial

story until long after she had persuaded the defendant to loan her and her husband the $850.00 mentioned in the evidence; nor until defendant had employed an attorney to secure repayment of principal, interest, or rentals, (P. 129, Tr.) nor until the charge had been made by her daughter, nor until it became necessary to bolster up the latter's weak story. She did not disclose that horrid attack upon her honor to her husband when it occurred, nor during the period when she and her husband were engaged in securing the loan, and attempting to persuade the defendant to assist them in their Sitka mining venture.

Upon the material facts necessary to convict the defendant under the charge in the idictment, the Malachoff girl, alone and without corroboration, made the statements of alleged facts. The defendant, unable to speak English, gaining his knowledge of the charge through an interpretor, denied the charges and the testimony of the girl quite as positively, and with such effect that the jury refused to convict on the girl's testimony, which they evidently disbelieved.

(b) THE JURY DISBELIEVED THE PROSECUTING WITNESS

The charge was statutory rape with her consent. If the girl told the truth that offense was consumated some time in May, a week after school adjourned on May 14th. (P. 13, Tr.) She testified that on 5 or 6 occasions thereafter she returned to his house and voluntarily consented to other completed acts of a similar nature. She testified to a complete crime of rape on each occasion, to penetra-

tion and consumation. She was calm, collected and clear in her statements, and if her testimony, under the circumstances, could be believed by the jury there was no doubt of the completion of the consumated crime of rape each time.

But the jury did not believe her evidence —they found the crime of rape had not been committed as sworn by her. But owing to the volubility of the hearsay evidence from two women, one of them a member of the Board of Childrens Guardians, the jury felt it incumbent upon them to do something. so they found him guilty of assault with intent,— that being the only other crime under the instructions of the court upon which they could find him guilty. Where the jury disbelieves a sole witness in the major and important part of her testimony, where she is cool, collected and positive, it ought not to be permitted to believe in the minor and less important part and to find a verdict of guilty thereon.

A case identical with this, in that respect, is State v. Mitchell, 54 Kan. 516; 38 Pac. 810, where the Supreme Court of Kansas said:

> "The prosecuting witness testified positively to the completed offense of rape, commited in the small space above described in this buggy box. The jury, notwithstanding her positive testimony, acquitted the defendant of the charge of rape, convicting him, however, of an attempt. In so doing they have found against the truth of her statements as to the principal fact testified to, while accepting her testimony as to minor matters. The explanation, and the

only explanation, offered by the state for this result, is that the jury must have regarded her statements as to the manner in which the offense was committed as incredible, and that they accepted so much as might have been true. The liberties of citizens ought not to be taken away, and severe punishment inflicted, on such testimony. The prosecuting witness knew, if she knew any fact connected with this matter, whether or not the main offense charged had been committed. If it had not, in fact, then she wickedly and corruptly sought to convict the defendant by perjury of that of which he was innocent, and she is utterly unworthy of belief. There is no other testimony in this case of any fact or circumstances, or of any act or declaration of the defendant, which is inconsistent with his entire innocence of any offense. The conviction, therefore, rests solely on the testimony of a witness whom the jury by their verdict have discredited and disbelieved as to the most important fact stated by her on the witness stand, and the fact concerning which, above all others, she could not possibly be mistaken. This court will not uphold a judgment resting for its only support on such a foundation."

State v. Mitchell, 54 Kan. 516; 38 Pac. 810.

In this case the jury did not believe the girl's major story, but compromised with its duty and defendant's rights, under the mistaken instruction of the court giving them that chance, and the hearsay evidence of the two women witnesses, one of whom

was frankly denunciatory of the crime, and both voluble in repeating the girl's story with emphasis.

(c) CONVICTION ON SIX DIFFERENT CRIMES PROVED

Another defect in, and insufficiency of, the evidence, and that the verdict was against the law, is established by this record in this: The indictment charged specifically that the statutory rape was committed on July 1st, 1921; the evidence of the girl was that the first consumated act was some time in May, a week after school closed on May 14. (P. 12, Tr.) She then testified positively that other completed acts occurred subsequently, and narrated the facts of the other crimes to the jury. (P. 20, Tr.) No election was required by the court of any specific act as the act to be submitted to the jury, no instruction limiting the attention of the jury to the act of July 1st, and no evidence showing specifically that either of the acts occurred on that day, or any other particular day was introduced.

As a matter of fact the court instructed the jury in paragraph V. of the instructions that the proof of rape must be of an act "at the time and place mentioned in the indictment"-to-wit, July 1st, 1921, but in the next paragraph, number VI, the instruction was changed and the court there said:

> "I instruct you that the exact date of the occurrence of the crime charged, if you find beyond a reasonable doubt that it did occur, is not necessary to be shown provided it is established beyond a reasonable doubt that it did occur within three years prior to the finding of the indictment in this case. By that I mean that

the prosecution is not obliged to prove that the crime was committed exactly on the first day of July, 1921, as laid in the indictment, but may prove the crime to have been committed any time within three years," etc.

Under these instructions, there being no election required of any date or act, the jury were free to choose different dates and different crimes, in arriving even at the verdict which they returned. In other words one juror may have based his verdict of assault with intent, on the act in May, another on another act on another date, and so on for the six different acts of rape testified to by the girl.

In an exactly similar case the Criminal Court of Appeals in Oklahoma reversed the verdict saying:

"In this state a person may be tried for and convicted of only one offense at a time. Rape is not continuous offense, and whilst in a prosecution for statutory rape proof of other acts of intercourse, occurring both prior to and subsequent to the one relied upon for a conviction, may be proved for the purpose of showing the intimate relations between the parties, etc., the conviction must be based solely upon one of such acts and not all of them, and it is error prejudical to the defendant, where no election of acts is required, to instruct the jury in effect that a conviction should result from proof beyond a reasonble doubt of any of such acts."

Smith v. State (Okla.) 201 Pac. 663.

Montour v. State 145 Pac. 811: 11 Okla, Cr. 376.

Sec. 2150 and 2153, Compiled Laws of Alaska, 1913, do not change this salutory rule. Section 2150 requires:

> "Sec. 2150. That the indictment must be direct and certain as it regards: First. The party charged; Second. The crime charged; and Third. The particular circumstances of the crime charged when they are necessary to constitute a complete crime."

And Section 2153 requires:

> "Sec. 2153. That the precise time at which the crime was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof, and within the time in which an action may be commenced therefor, except where time is a material ingredient in the crime."

The general form of the indictment used in this case is prescribed by Section 2148, Comp. L. Alaska, 1913, where a specific date is required by the statute, and while it may be "the precise time at which the crime was committed need not be stated in the indictment, but it may be alleged," etc., still in this case, following the statutory form, *it was alleged, and was not proved;* there was, therefore a failure of sufficient evidence to make the case charged; the proof of other and different crimes at other and different times, further served to mislead the jurors and secure a verdict in a case where they had six different crimes to choose from to get one to their notion.

2. *The trial court erred in giving instruction number XI. to which proper objection was made and an exception allowed:*

Instruction XI was given in the following form:

"XI."

"A section of our statute provides that in all cases of criminal prosecutions the defendant may be found guilty of any crime the commission of which is necesarily included in that with which he is charged in the indictment or of an attempt to commit such a crime; and a further section provides that whoever assaults another with intent to kill or commit rape or robbery upon the person so assaulted, shall be imprisoned, etc."

"I charge you that the crime of assault with intent to commit rape is necessarily included in the crime of rape as charged in the indictment in this case, and if you, after a careful consideration of all the evidence produced before you under the instructions I have heretofore given you, conclude that the defendant is not guilty of the crime of rape as charged in the indictment, you should consider whether he is guilty of the crime of assault with intent to commit rape; and in this connection I charge you that where a female is capable of consenting under the law, there cannot be an assault to commit rape if she consents, but in a case where the female is under the age of consent—that is under the age of 16 years, the law steps in and says she is incapable of assent

—the law, in other words, resists for her." (P. 153, Tr.)

(a) ASSAULT WITH INTENT TO COMMIT RAPE

The indictment in this case was carefully drawn under the second clause in Section 1894, Compiled Laws of Alaska, 1913, which is as follows:

> "Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, *or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

The charging part of the indictment, under the last clause of Section 1894, above italicised, reads as follows:

> "The said Peter Sekinoff, at or near Juneau within the said District of Alaska, and within the jurisdiction of this court, on the first day of July, in the year of our Lord one thousand nine hundred and twenty one, did the said Peter Sekinoff, being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the age of sixteen years, to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malachoff."

A comparison of the law with the charging part of the indictment demonstrates that the pleader was careful to charge that the rape was statutory, merely, and "*with her consent*," as the statute pro-

vides, and as stated in her evidence. Under that statute and indictment was it error to instruct the jury, as was done in instruction numbered XI, herein, that "*assault with intent ot commit rape is necessarily included in the crime of rape as charged in the indictment in this case?*"

Counsel admits that such an instruction to an indictment drawn under the first part of Section 1894, supra, would be proper, for such an indictment must have alleged the rape was done "forcibly and against her will," but where the indictment charges, as in this case, that it was "with her consent," and the allegations of the indictment specially negative force or anything approaching it, or "an assault," the rule seems to be the other way.

True, the indictment in this case contains words charging that defendant did "*knowingly, wilfully, wrongfully, unlawfully, feloniously carnally* know and abuse Sonia Malachoff," but purposely avoids any reference to force or assault against her will.

The Statutes of Alaska provide, Compiled Laws, 1913:

> "Sec. 2150. That the indictment must be direct and certain as regards: First. The party charged; Second. The crime charged; and Third. The particular circumstances of the crime charged when they are necessary to constitute a complete crime."

Now the indictment in this case is direct and certain with regard to, first, the party charged, second, the crime charged, and, as defendant's counsel thinks, third, as to the particular circumstances of the crime charged, being necessary to constitute the

complete crime attempted to be charged. The fault is not with the indictment—it honestly states the fair purpose of the prosecuting attorney—the fault lies with the instruction which attempts to authorize the jury to find a verdict under a good indictment for an offense not included in it either by the law or the intent of the pleader.

The instruction informs the jury that assault with intent to commit rape is necessarily included in the crime of rape as charged. (*"and if you, after a careful consideration of all the evidence produced before you under the instructions I have heretofore given you, conclude that the defendant is not guilty of the crime of rape as charged in the indictment, you should consider whether he is guilty of the crime of assault with intent to commit rape, etc."*)

The jury did find the defendant not guilty of the crime of rape, even on the positive evidence of the girl that he was guilty of six consummated and complete offenses, because her testimony was so incredible as not to be believed—but upon the prejudice of the hearsay testimony of Mrs. Kashaveroff and Mrs. Malachoff's charges of another crime against her, and upon the error in the charge of the court, they found him guilty of an offense which the district attorney and the law did not intend to charge in that indictment.

The indictment in this case does not contain any statement "as to the particular circumstances of the crime charged where they are necessary to constitute a complete crime," of an included crime of "assault with intent to commit rape."

State v. Russell, 64 Kan. 798; 68 Pac. 615.

People v. Akin, (Cal.) 143 Pac. 795.

In the California case the court said:

"Defendant is charged with having had carnal intercourse with a female under the age of consent and he was convicted of "assault with intent to commit rape." Several reasons are urged by appellant for reversal, but the most serious question, which is not discussed or suggested at all, is whether the verdict is within the scope of the information, in other words whether the defendant was convicted of a different crime from that charged against him. (1) The charging part of the information is that:

"*The said Jack Akin did on or about the 12th day of May, A. D.* 1913, *at Butte County and State of California, and before the filing of this information, wrongfully, unlawfully, wilfully, and feloniously accomplished an act of sexual intercourse with one Nora Heckart, the said Nora Heckart being then and there a female under the age of sixteen years, to-wit, of the age of eleven years, and not being then and there the wife of the said Jack Akin.*"

"It is thus to be seen that the element of force is not charged, as indeed it is not required to constitute the offense of rape on the person of a female under the age of consent. The crime of assault with intent to commit rape necessarily implies, however, the use of force and violence, and negatives the idea of consent upon the part of the victim. Of course, if the defendant had been charged with rape on the

person of an adult, the element of force would have been included in the charge, and thus the information would have comprehended the crime of which he was convicted. Or, if the defendant had been convicted of an "attempt to commit rape," we could say that it was covered by the charge, because every crime includes an attempt to commit said crime. But "an assault implies repulsion, or at least want of consent on the part of the person assaulted." People v. Dong Pok Yip, 164 Cal. 146; 127 Pac. 1032."

The court further said of the principle involved in that and in this case:

"The same criticism might be made of the instruction given here, but in addition we think the verdict does not respond to the averments of the information. This is not a technical objection, but it goes to the fundamental right of the defendant to be formally charged with the crime of which he may be convicted."

And in the case of State v. Pickett, 11 Nev. 255; 21 Am. Rep. 754, cited in the Akin case, the opinion by Judge Beatty lays down the rule we think is applicable to the case at bar:

"By virtue of the provisions of sections 2464 and 2037, this defendant might have been convicted of an "attempt to commit rape," even if the child consented to all he did; but it was error to instruct the jury that he could be convicted of "asault with intent," etc, in that case. There can be no assault upon a consenting female, although there may be what the statute designates a rape."

That case was reversed for the error in giving an instruction similar to the one given in the Akin case, and almost identical with that given in the case at bar.

(b) AN ATTEMPT IS AN INCLUDED CRIME

In the first paragraph of instruction XI complained of, the trial court told the jury:

> "A section of our statute provides that in all cases of criminal prosecutions the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment *or of an attempt to commit such crime;" etc.*

The court then instructed the jury fully on the supposed included crime of "assault with intent to commit rape," but gave no instruction to the jury, whatever, on the included crime of attempt to commit the crime charged in the indictment. The court wholly withheld from the jury the included crime of attempt, and in the last instruction, Number XIV, told the jury (P. 156, Tr.):

> "I hand you three forms of verdict, 1. finding the defendant guilty as charged in the indictment; 2. finding the defendant guilty of assault with intent to commit rape; and, 3. not guilty."

The instruction number XI, on the subject of attempt was so clearly an error, from its want of statement, and by reason of the failure of the judge to submit it to the jury, that it seems to prove itself. This failure on the part of the court shows that he mistook the element of "assault" for that of "at-

tempt"—that he instructed them on assault instead of attempt through the hurry of the trial.

Sections 2073 and 2074, Compiled Laws of Alaska' 1913, provide for the punishment of attempts to commit crime in general provisions so attempt is an included offense under section 2269 to every substantive crime in the criminal code.

> "Sec. 2269. That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, *or of an attempt to commit such crime.*"

There may be substantive statutory crimes in the Alaska penal code which do not necessarily include another crime, except an attempt, but none can be found which does not include an attempt. For instance: Sec. 1894, under which the indictment in this case was drawn, states two separate substantive crimes,—rape, "*forcibly and against her will,*" and statutory rape on a female under sixteen, "*with her consent,*" the first of these substantive crimes contains four included crimes:—attempt, assault with intent, assault and battery and simply assault; the second substantive crime, rape "with her consent," contains only the single included crime of attempt. The court, however, instructed the jury, in effect, that both the first and second substantive crimes in the section necessarily included all the included crimes of both.

And right there is where the court erred:

(1) *Of course, an indictment may be found under Section* 1894 *for assault with intent to commit rape upon any female over or under* 16 *years of age, forc-*

ibly and against her will, but it must be found under the first clause of that section, and not under the second.

(2) *If an indictment is returned for rape on any female, whether over or under the age of sixteen years, forcibly and against her will, the substantive crime charged will necessarily include the lesser crimes of assault with intent to commit rape, assault and battery, simple assault, and attempt to commit rape.*

(3) *But where the substantive crime charged in the indictment is that of statutory rape, upon a girl under sixteen years of age, with her consent, as in this case, the only lesser crime necessarily included therein is attempt; the element expressed by the words "forcibly and against her will" is wholly excluded, purposely and by the plain language and logic of the law.*

(4) *Again, the indictment in this case was correctly drawn, upon the facts as the United States Attorney had them from the prosecuting witness, under the second clause of Section* 1894; *the error in the case was committed in giving an instruction which had no application to the second, but only to the first, clause of Section* 1894, *and to the substantive crime there charged, and refusing an instruction pointing out the error.*

The Supreme Court in a Kansas case said:

> "In a prosecution for statutory rape, where there was evidence tending to show no more than an attempt, it was held to be the duty of the court to instruct the jury as to the law of attempt to commit the offense, *although the*

defendant had not asked for such an instruction."

State v. Grubb, 55 Kan. 678; 41 Pac. 951.

State v. Langston, 106 Kan. 672; 189 Pac. 153.

(c) LESSER CRIMES INCLUDED IN THAT OF ASSAULT WITH INTENT

Even if it be conceded the court correctly gave the instruction upon assault with intent to commit rape, the court erred in failing and refusing to give an instruction to the jury on the lesser degrees of crime included in that crime. Assault and battery and simple assault are made crimes in Alaska by the provisions of section 1905, Compiled Laws of Alaska, 1913, and both are clearly included in and are lesser degrees of the crime of assault with intent to commit rape or any other substantive crime based upon an attack on the person. Of course both assault and assault and battery are necessarily included in a charge,—

> "Sec. 1898. That whoever assaults another with intent to kill, or to commit rape or robbery upon the person so assaulted, shall be imprisoned," etc.

When the court instructed the jury they might find the defendant guilty of assault with intent to commit rape under the above section, they should also have been instructed under the statutory rule that they might find him guilty of lesser and included crimes in that offense, for section 2252 of the Alaska Code of Criminal procedure declares:

> "Sec. 2252. That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two

or more degrees he is guilty, he can be convicted of the lowest of those degrees only."

And no such instruction was given in this case, neither in XI or XIII, complained of, or at all, and the giving of those instructions, in the manner in which they were given, is equivalent to a refusal to give correct instructions.

And in Arizona:

"(7) The court in its instructions should declare fully the law upon every degree of homicide of which the accused could be convicted, which is supported by evidence. State v. Baker, 13 Mont. 160; 32 Pac. 647; 2 Cyc. 1065, notes 39, 40 and 41, and Id., 1063, note 26."

"It is the duty of the trial court to clearly define the grades of the offense included in the indictment of which the accused, under the evidence, may be convicted. Under the indictment and the evidence in this case, the accused could have been convicted of any degree of homicide, or acquited. * * * * The court gave no instructions presenting the phases of the testimony applicable to voluntary manslaughter, excusable homicide, justifiable homicide, nor inevitable accident or misfortune; nor did the court instruct the jury upon the phase of the case presented assuming the arrest or attempted arrest to have been unlawful and without legal authority; and, in the absence of such instruction, we deem substantial rights have been denied appellant from which we presume he has suffered material injury."

"For which errors in the instructions as

given and the failure of the court to instruct as intimated above, the judgment of the trial court is reversed," etc.

Stokes v. Territory, 14 Ariz. 242; 127 Pac. 742.

An identical case with the one at bar is that of People v. Watson, 125 Cal. 342; 57 Pac. 1071, where the Supreme Court of California said:

"This defendant's position upon the matter under discussion is much stronger than we find in those cases where the court fails to instruct at all upon the question. In some of those cases it has been held that the defendant should have asked for an instruction directed to the particular point. But in the present case the giving of the instructions we have quoted is, in substance, the equivalent of a refusal to give an instruction authorizing the jury to find a verdict of guilty against the defendant under the aforesaid sections of the Penal Code, provided the evidence justified it. * * * * The trial judge, of his own motion, should inform the jury in every case as to all the particular crimes involved in the information which the evidence to any extent tends to support. Such is a most commendable practice; but here we are not concerned in that matter, for we have a case much stronger than one where the court did not act at all. It is not a case on non-action, but erroneous action. For the foregoing reasons, the judgment and order are reversed," etc.

People v. Watson, 125 Cal. 342; 57 Pac. 1071.

Musgrave v. Territory, 12 Ariz. 123; 100 Pac. 440.

State v. Frazier, 50 Kan. 87; 36 Pac. 58.

Territory v. Nichols, 3 N. M. 103; 2 Pac. 78.

In State v. Vinsant, 49 Iowa 241, which was a prosecution for rape, the court says:

> "Whoever is charged with the crime of rape is charged with all that constitutes it, and one of the elements of rape is an assault."

And the judgment in that case was reversed because the jury was not directed to find the accused guilty of a simple assault in case the evidence warranted such a verdict. See, also, Comm. v. Drum, 19 Pick. 480. And in a note to section 2494, Thomp. Trials, it is said that the court ought not to so instruct the jury as to take from them the right of determining the grade of the crime of which the accused stands charged; citing Vollmer v. State, 24 Neb. 838; 40 N. W. 421, Adams v. State 29 Ohio St. 412, and Shaffner v. Comm. 72 Pa. St. 60.

3. *The trial court erred in giving instruction number XIII. to which objection was made and an exception was allowed.*

Paragraph XIII of the instructions in this case is subject to the objections made to paragraph XI in the foregoing pages of the brief, but it is also open to the further objection that it is a distinct refusal on the part of the court to instruct the jury in relation to attempt, and to the lesser degrees of asault. It also peremptorily withdraws from the jury the power to judge of the facts in relation to such attempt and included crimes.

The true rule in such cases is that if there is any testimony in support of such inferior degrees or included crimes it is the duty of the court to submit the

matter to the determination of the jury under proper instructions.

Stevenson v. U. S. 162 U. S. 313; 40 L. Ed. 980.

Wallace v. U. S. 162 U. S. 466; 40 L. Ed. 1039.

Sparf v. U. S. 156 U. S. 51; 39 L. Ed. 343.

But where there is no evidence before the jury in support of any included crime or lesser degree the jury must either convict or acquit on the crime charged.

Sparf v. U. S. 156 U. S. 51 (106); 39 L. Ed. 343 (362).

Anderson v. U. S. 170 U. S. 510 (511): 42 L. Ed. 1126.

Davis v. U. S. 165 U. S. 379; 41 L. Ed. 754.

Thorwegan v. King, 111 U. S. 549; 28 L. Ed. 514.

That the lower court believed there was evidence of the commission of an inferior degree or of included crimes in the case at bar is shown conclusively by the instructions XI and XIII given by the court. Both the court and the jury heard the prosecuting witness testify positively to the commission of six completed and consummated acts of rape upon her body, with her consent, and heard her detail the circumstances in connection with each, but did not believe her story. They still gave her untruthful statements credence by submitting the lesser degree of assault with intent to commit rape to the jury, while excluding attempts and the lesser degrees of assault.

Now it seems logical and within the rules laid down by the courts of highest character that the defendant in this case was either (1) Guilty as charged

in the indictment, or (2) guilty of attempt, or (3) not guilty. But the court below concluded there was doubt of his guilt as charged, and chose to submit one of the supposed inferior grades of included crime to the jury instead of all, and thereby committed error.

4. *Court refused to give fundamental instructions.*

Sec. 2246. Compiled Laws of Alaska, 1913, provides the orderly procedure in the trial of criminal cases, and in the first paragraph orders that "when the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court; which instructions shall be reduced to writing if either party requests it."

The seventh paragraph of the section provides:

> "Seventh. The court, after the argument is concluded, shall immediately and before proceeding with other business charge the jury; which charge, or any charge given after the conclusion of the argument, shall be reduced to writing by the court, if either party requests it before the argument of the trial is commenced; such charge or charges, or any charge or instructions provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in no manner explained to the jury by the court; all written charges and instructions shall be taken by the jury in their retirement, and returned with their verdict into court and shall remain on file with papers of the case."

Section 2266, Comp. Laws of Alaska, 1913, provides:

"Sec. 2266. That although the jury have the power to find a general verdict, which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court:" etc.

Under the statutes in force in Alaska, then, it is the duty of the court to instruct the jury on the law of the case, and it is the duty of the jury "to receive as law what is laid down as such by the court." While a defendant may request special instructions under the fifth paragrph of section 2246, supra. he is not obliged to do so, and if he request it, the seventh paragraph of that section makes it the statutory duty of the judge to charge the jury in writing, fully and upon the issue presented to the jury within the indictment, and the evidence presented to the jury. The judges duty is only limited by the issue of law presented in the indictment, and the evidence admitted by him to the jury.

> "It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and respecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside

a verdict which is unsupported by evidence or contrary to law."

Pleasants v. Fant. 89 U. S. 116; 22 L. Ed. 780.

Texas & P. Ry Co. v. Rhodes, 71 Fed. 145 (148)

Ulman v. Clark, 100 Fed. 180 (195).

In a case coming from Alaska the Supreme Court of the United States said upon the general duty of the trial court in matters of instruction to the jury:

"It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, Vol. 3 Par. 3162, 7th Edition. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.

"It has sometimes been said that if the judge omits something, and is not asked to supply the defect, the party who remained voluntarily silent cannot complain. But such a principal cannot apply to the present case, because the judge's attention was directly called by the government's request to the question of self defense, and because the defect in that request was then and there pointed out by the defendant's counsel in their exception. The defendant as shown in the bill of exceptions,

had testified to his own belief that his life was in danger, and to the facts that led him so to believe; but by the instruction given the jury were left to pass upon the vital question without reference to the defendant's evidence."

Bird. v. U. S. 180 U. S. 356; 45 L. Ed. 570 (573.)

And, similarly, the attention of the trial judge was directed to the matter of instructing upon lesser and included crimes and attempts, for in his first paragraph in instruction XI he distinctly states that fact—and yet left the jury to pass upon vital questions stated by himself therein without reference either to the evidence or without necessary instructions for their guidance.

In the case of Coffin v. U. S. 156 U. S. 432; 39 L. Ed. 481, the Supreme Court discussed the error of the trial court in refusing to instruct the jury upon the presumption of innocence, and said:

"The authorities upon this question are few and unsatisfactory. In Texas it has been held that it is the duty of the court to state the presumption of innocence along with the doctrine of reasonable doubt, even though no request be made to do so. Black v. State, 1 Tex. App. 369; Priesmuth v. State, 1 Tex. App. 480; McMullen v. State, 5 Tex. App. 577. *It is doubtful, however, whether the rulings in these cases were not based upon the terms of a Texas statute, and not on the general law.*"

The rule in California is thus stated:

"*It is the duty of a court in criminal cases*

to give, sua sponte, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to such cases; but it is not its duty to give instructions on specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. This rule is so well settled that authorities need not be cited herein in support of the statement thereof."

People v. Peck,———Cal. App.———; 185 Pac. 881.

And in Oklahoma:

"Instructions not objected to in the trial court, nor called to the attention of the trial court on the motion for a new trial, will not be considered on appeal unless *fundamentally erroneous."*

Williams v. State,———Okla. Cr. ———; 191 Pac. 744.

Russell v. State,———Okla. Cr.———; 194 Pac. 242.

Ford v. State, 5 Okla. Cr. 241; 114 Pac. 274.

Birdwell v. U. S. 10 Okla. Cr. 159; 135 Pac. 445.

And in Nebraska:

"It is well settled in this state that it is the duty of the trial judge, particularly in criminal action, to instruct the jury as to the rules of law governing the disposition of the cause, whethed he is requested to do so or not; and if

the charge to the jury, by ommission to instruct on certain points, in effect withdraws from the consideration of the jury an essential issue of the case, it is erroneous. Pjarrou v. State, 47 Neb. 294; 66 N. W. 422; Dolan v. State, 44 Neb. 643; 62 N. W. 1090; Long v. State, 23 Neb. 33; 36 N. W. 310."

Young v. State —— Neb. —— ; 104 N. W. 867.

It is the duty of the court to instruct the jury on the issues presented by the indictment and evidence admitted thereon without request.

Brickwood-Sacketts Inst. Vol. 1, Secs. 155, 157.
Owen v. Owen, 22 Iowa, 270.
State v. Brainerd, 25 Iowa, 572.
Upton v. Paxton, 72 Iowa 299; 33 N. W. 777.
Barton v. Gray 57 Mich. 622.
People v. Murray, 40 N. W. 29. (Mich.)
Warton's Crim. P. & P. 9th Ed. Sec. 709, 793.
Lang v. State, 1 S. W. (Tenn.) 319.

5. *Court failed to give statutory instructions.*

Sec. 2246, Compiled Laws of Alaska, 1913, requires the court to give the charge—the instructions —to the jury (and when requested) in writing.

In addition to this general requirement other sections of the criminal statutes require the court to give certain fundamental instructions in criminal cases, some of which were given in this case, and others of which were not. Among those statutory requirements are the following:

"Section 2252. That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two

or more degrees he is guilty, he can be convict- of the lowest of those degrees only."

Now that section requires the court to instruct on the degrees of crime included in the substantive crime charged in the indictment and the lesser degrees thereof, and to instruct the jury specifically as stated in the statute, that if there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. No such differentiation of the degrees was made, with respect to attempt, or with respect to assault and battery and assault in the crime which the court did submit, and by reason of this refusal to give the statutory instructions there was error.

The next statutory command was the following:

> "Section 2262. That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission.'

Section 1505 also provides that the jury shall "be instructed by the court on all proper occasions: * * * * Fourth. That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution."

These statutory provisions were adopted from Oregon where that Supreme Court holds:

> "One who admits participation in adultery

is an accomplice."

State v. Scott, 28 Ore. 331; 42 Pac. 1.

or in incest,—and rape,—

State v. Jarvis, 18 Ore. 360; 23 Pac. 251.

or fornication, (citing People v. Jenness, 5 Mich 321.)

State v. Jarvis, 20 Ore. 437; 26 Pac. 302.

> "In the case before us the defendant accomplished his purpose, either by the consent of the prosecutrix or by force,—if by her assent, she was an accomplice, and a conviction could not be had on her uncorroborated testimony," etc.

State v. Jarvis, 20 Ore. 437, supra.

Where a girl is old enough and knowing enough to consent and does consent to have six acts of connection with a man at different times and hides the fact from her protectors she is within the evil which the law intends to prohibit by the sections above quoted, and the court erred in not giving such instruction of its own motion. In this case the judge gave the jury a cautionary instruction (IX) but failed and refused to give the instruction commanded by the statute, whereby there was error.

A similar section, intended to protect a defendant in such cases from the injustice so fairly pointed out by the court in his instruction number V in this case, is section 2264 of the compiled Laws of Alaska, 1913. (Italics mine.)

> "2264. That upon the trial for inveigling, enticing, or taking away an unmarried female for the purposes of prostitution, *or having se-*

duced and had illicit connection with an unmarried female, the defendant cannot be convicted upon the testimony of the female injured, unless she is corroborated by some other evidence tending to connect the defendant with the commission of the crime."

Two other sections of our code of criminal procedure are as follows, (Italics mine):

"Sec. 2268. That upon an indictment for a crime consisting of different degrees,*the jury may find the defendant not guilty of the crime charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof.*"

And (Italics mine):

"Sec. 2269. *That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime.*"

In this case the crime charged in the indictment is statutory rape, "with her consent," and the only included crime is that of *attempt.* The jury refused to convict of the crime charged, but under the instructions of the court found the defendant "guilty of assault with intent to commit rape." Included in that are three included crimes, viz. Assault and battery, assault, and attempt.

Notwithstanding the positive commands of the statute the court failed and refused to instruct the jury on either of these included crimes or attempt,

and thereby caused fundamental harm to the defendant.

6. *No assignments of errors made.*

There may not be found in this record any request for instructions on the elements complained of in the last above paragraph, nor any assignments based thereon, but the rule of this court provides (Rule 11): "but the court, at its option, may notice a plain error not assigned." And also rule 24, paragraph 4 provides "but the court, at its option, may notice a plain error not assigned or specified."

A similar provision is found in paragraph 4, Rule 21, of the Supreme Court of the United States.

> "An appeal will not be dismissed for want of an assignment of errors, as the court, under rule 21, paragraph 4, may, at its option, notice a plain error not assigned."
>
> U. S. v. Penn. 175 U. S. 500; 44 L. Ed. 251.
>
> School Dist. v. Hall, 106 U. S. 428; 27 L. Ed. 237.

In a recent case in the 8th Circuit the court said (Italics mine):

> "*No exception was saved to this additional charge, but we have considered the objections urged against it because the liberties of citizens are involved.*"
>
> Lucas-Hicks v. U. S. 275 Fed. 405.

Upon the foregoing instructions and statements of counsel for the plaintiff in error we think the verdict of the jury ought to be reversed and the defend-

ant below discharged, because; first, there was no evidence, and can be none, that the jury or any body else ought to believe, to connect him with the commission of the crime charged in the indictment, or any attempt to commit such crime; second, because of the many fundamental errors in charging the jury and; third, in the failure of the court below to grant the defendant a new trial.

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